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11 \* Not admitted in California; pro hac vice application submitted 06/06/08

12 UNITED STATES DISTRICT COURT  
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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1 MASON AND DIXON INTERMODAL, INC., )  
 Plaintiff, )

2 v. )

3 LAPMASTER INTERNATIONAL, LLC AND )  
 HARTFORD INSURANCE CO. )  
 Defendants. )

4 LAPMASTER INTERNATIONAL, LLC )  
 Counterclaimant, )

5 v. )

6 MASON AND DIXON INTERMODAL, INC., )  
 Counterclaimant. )

8 HARTFORD FIRE INSURANCE COMPANY, )  
 9 individually and as subrogee of Lapmaster )  
 International LLC., )  
 10 Third-Party Plaintiff, )

11 v. )

12 ITG TRANSPORTATION SERVICES, INC.; )  
 WORLD EXPRESS SHIPPING, )  
 TRANSPORTATION AND FORWARDING )  
 13 SERVICES, INC. d/b/a/ W.E.S.T. FORWARDING )  
 SERVICES; DOES 1 through X, inclusive )  
 14 Third-Party Defendants. )

15 AND RELATED CROSS-ACTION )  
 16

Case No. CV-08-1232-VRW

**W.E.S.T. FORWARDING SERVICES'  
 COUNTERCLAIM AGAINST  
 MASON AND DIXON  
 INTERMODAL, INC.**

17  
 18 Third-Party Defendant, W.E.S.T. Forwarding Services, Inc. ("W.E.S.T."), by and through  
 19 its undersigned counsels, hereby files its Counterclaim against Mason and Dixon Intermodal, Inc.  
 20 ("Mason"), and states as follow:  
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 22  
 23  
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## **JURISDICTION VENUE**

1  
2 1. Jurisdiction of this Counterclaim is based on 28 U.S.C. §§ 1331 and 1333, in that the  
3 Counterclaim relates to cargo damage and presents a federal question under federal common law  
4 and/or federal statutes. This Court also has supplemental jurisdiction over W.E.S.T.'s claims against  
5 Mason because these claims result from a common nucleus of operative facts and relate to the federal  
6 claims alleged in the Complaint and Counterclaim.

7  
8 2. W.E.S.T. is informed and believes and on that basis alleges that this Court also has  
9 jurisdiction of this Counterclaim based on diversity of citizenship, in that this is a civil action between  
10 citizens of different States and the amount in controversy exceeds \$75,000.00, exclusive of interest  
11 and costs.

## **PARTIES**

12  
13 3. W.E.S.T. is, and was at all relevant times, an Illinois corporation with its principal  
14 place of business in the State of Illinois.

15  
16 4. W.E.S.T. is informed and believes, and on that basis, alleges that Mason is, and was at  
17 all relevant times, a corporation organized under the laws of Michigan, with its principal place of  
18 business in Warren, Michigan.

## **GENERAL ALLEGATIONS**

19  
20 5. Upon information and belief Lapmaster sold a Precision Flat Lapping Machine and a  
21 Precision Flat Polishing Machine ("the Machines") to Hayward Quartz Technology, Inc.

22  
23 6. The Machines were shipped from Japan by Hamai Co., Ltd., and transported by Ocean  
24 Vessel Cosco Hong Kong from the Port of Yokohama, Japan pursuant to Waybill No. Y05F4451887  
25 and other documents to the Port of Oakland, California.

26  
27 7. At Oakland, California, W.E.S.T. arranged for motor transport of the Machines from  
28 Oakland to Fremont, California through ITG.

8. On or about December 27, 2007, Mason picked up the Machines at the Port of Oakland

1 and began transporting the same to Fremont, California .

2 9. On or about December 27, 2007, Mason negligently, carelessly and recklessly operated  
3 and drove their tractor trailer trucks so as to cause the tractor trailer trucks and Machines, as cargo, to  
4 collide with certain overpasses on Interstate 880 in California.

5 10. The negligent, careless and reckless operation of the tractor trailer trucks and carriage  
6 of the cargo by Mason and its agents proximately caused damage to the Machines, and other damages,  
7 losses and expenses.

8 11. Upon information and belief, Hartford issued an insurance policy to its insured  
9 Lapmaster under policy number 83 UUQ RZ2879.

10 12. Upon information and belief, as a result of a collision causing damage to the Machines,  
11 Lapmaster filed a claim for loss under the policy with Hartford, and Hartford compensated Lapmaster  
12 for its costs, losses and expenses. Subsequently, Lapmaster and Hartford have filed actions against  
13 W.E.S.T. for their damages. To the extent that W.E.S.T. is or may become liable, it is entitled to  
14 obtain recovery and reimbursement from Mason.  
15

### 16 **FIRST COUNTERCLAIM**

#### 17 **(Breach of Bailment Contract)**

18 13. Counterclaim alleges and incorporates by reference each and every allegation  
19 contained above as thought fully set forth herein.  
20

21 14. At all relevant times herein, W.E.S.T., as an agent of Lapmaster, entrusted the  
22 Machines to Mason for purposes of transporting the Machines from the Port of Oakland to Fremont,  
23 California.  
24

25 15. On or about December 27, 2007, W.E.S.T. entrusted the Machines to Mason.

26 16. Mason picked up the Machines at the Port of Oakland in excellent condition.

27 17. A bailment contract was created between W.E.S.T. and Mason by virtue of W.E.S.T.  
28 entrusting the Machine to Mason in exchange for payment. Mason accepted possession and custody of

1 the machines.

2 18. Under the law of bailments, and/or under the terms of the bailment, Mason impliedly  
3 and/or expressly promised to delivery the Machines in the same condition as at the time of pickup.

4 19. W.E.S.T. is informed and believes and thereof alleges that Mason, on or about  
5 December 27, 2007, breached the agreement by, but not limited to, negligently, recklessly, carelessly,  
6 wantonly entrusted and/or operated the tractor trailer truck so as to collide and strike an overpass on  
7 the 880 Freeway near Oakland, California.

8 20. On or about December 27, 2007, Mason, breached the bailment contract by, but not  
9 limited to, failing to deliver the Machines in the same conditions as picked up.

10 21. W.E.S.T. duly informed all conditions, covenants and requirements on its part to be  
11 performed in a timely manner or, alternatively, has been excused from such performance on account  
12 of Mason's breach.

13 22. As a result of Mason's breach of bailment agreement, W.E.S.T. may suffer loss when  
14 the Machines suffered severe property damage and were eventually declared a total loss.

15 23. As a direct and proximate result of the Mason's conduct in breaching the bailment  
16 agreement, W.E.S.T. may sustain damages in an amount to be proven at the time of trial.

## 17 **SECOND COUNTERCLAIM**

### 18 **(Breach of Transportation Contract)**

19 24. Counterclaim alleges and incorporates by reference each and every allegation  
20 contained above as thought fully set forth herein.

21 25. The matter complained of herein and the liability of Mason is predicated, inter alia,  
22 upon the transportation of property by Mason under 49 U.S.C. §§ 13702 and 13706, and 49 U.S.C. §  
23 14706.

24 26. On or about December 27, 2007, Mason entered into and accepted a contract for the  
25 transport of the Machines from the Port of Oakland, California to Fremont, California.

1           27.     On or about December 27, 2007, Mason accepted the Machines for transport.

2           28.     On or about December 27, 2007, Mason drivers collided with certain overpasses on  
3 Interstate 880 near Oakland, California.

4           29.     In accordance with 49 U.S.C. §§ 13702 and 13706 and 49 U.S.C. § 14706, Mason is  
5 obligated to pay for the damages it caused to the Machines.

6           30.     W.E.S.T. has performed all the terms and conditions required.

7           31.     Despite the timely demand for reimbursement, Mason refused to pay for the damaged  
8 Machines and instead initiated litigation against Lapmaster and Hartford seeking declaratory relief  
9 under COGSA.  
10

11           32.     Mason is liable pursuant to the terms of the agreement and 49 U.S.C. §§ 13706 and  
12 13707, and 49 U.S.C. § 14706.

13           33.     The unpaid amounts owed are liquidated amounts which became due on specified  
14 dates; thus, Counterclaimant is entitled to pre-judgment interest on all such obligations from dates on  
15 which they became due through the date of judgment.  
16

17                           **THIRD COUNTERCLAIM**

18                                   **(Implied Indemnity)**

19           34.     Counterclaim alleges and incorporates by reference each and every allegation  
20 contained above as thought fully set forth herein.

21           35.     W.E.S.T. is informed and believes and on that basis alleges that they are entitled to  
22 implied indemnity, based on the agreements referred to above and principles of maritime and federal  
23 common law. A right to indemnity for the damages, losses and expenses is implied, if not express, in  
24 the terms of the agreements between the parties.  
25

26                           **FORTH COUNTERCLAIM**

27                                   **(Equitable Indemnity)**

28           36.     Counterclaim alleges and incorporates by reference each and every allegation

1 contained above as thought fully set forth herein.

2 37. W.E.S.T. is entitled to equitable indemnity from Mason under California law, for  
3 damages to the Machines and all other damages, losses and expenses incurred by Counterclaim action  
4 in connection with the accident alleged above. Counterclaim is entitled to such equitable indemnity  
5 by virtue of the relationship of the parties, in which Mason, as the motor carrier of the Machines from  
6 Oakland to Fremont, had control over the cargo and the instrumentalities of delivery, and Mason and  
7 its agents or subagents were negligent or otherwise at fault, proximately causing the Machines  
8 damages and other damages, losses and expenses alleged above.  
9

#### 10 **FIFTH COUNTERCLAIM**

##### 11 **(Negligence)**

12 38. Counterclaim alleges and incorporates by reference each and every allegation  
13 contained above as thought fully set forth herein.

14 39. Mason. and its employees, agents and subagents had a duty to use reasonable care and  
15 take reasonable industry-wide precautions during its transport of the Machine.  
16

17 40. Mason and its agents and subagents were negligence in their transport of the Machines  
18 by failing to use reasonable care and take reasonable precautions such as measuring its load and  
19 causing the Machines to collide with certain highway overpasses.

20 41. Mason's negligence proximately caused or contributed to the Machines being damage  
21 and the other damages, losses and expenses alleged above.

22 42. W.E.S.T. is therefore entitled to recover damages from Mason, as the carrier of the  
23 Machines from Oakland to Fremont.  
24

#### 25 **SIXTH COUNTERCLAIM**

##### 26 **(Negligence Per Se)**

27 43. Counterclaim alleges and incorporates by reference each and every allegation  
28 contained above as thought fully set forth herein.

1           44.     On or about December 27, 2007, Mason owed a duty of care, as defined by federal,  
2 state and local statutes, rules, codes and regulations, including, but not limited to California Vehicle  
3 Code § 35250 (Maximum Vehicle or Load Height).

4           45.     Mason willfully or otherwise breach the duties of care defined by federal, state and  
5 local statutes, rules, codes and regulations, all of which were owed to the public and Lapmaster  
6 International, LLC ("Lapmaster").

7           46.     Mason is in a class sought to be protected by the applicable federal, state, and local  
8 statutes, rules, codes and regulations, and the type of damages suffered by Counterclaimant are the  
9 type of harm sought to be prevented by applicable federal, state and local statutes, rules, codes and  
10 regulations.

11           47.     As direct and proximate result of Mason's conduct in breaching the duties set forth by  
12 applicable federal, state, and local statutes, rules, codes and regulations, Counterclaimant may sustain  
13 damages in an amount to be proven at the time of trial.

14           **WHEREFORE**, Counterclaim prays for judgment against the Counter-defendant Mason as  
15 follows:  
16

- 17
- 18           A.     For the amount of damages Lapmaster suffered from the accident involving the
  - 19                   Machines, for which it may become liable as proven at trial;
  - 20           B.     For cost and attorneys fees permitted by law;
  - 21           C.     For prejudgment interest as permitted by law, including, but not limited to, California
  - 22                   Civil Codes §§ 3287 and 3288; and
  - 23           D.     For such other relief as this Court deems just and fair.

24                   **DEMAND FOR JURY TRIAL ON COUNTERCLAIMS**

25           W.E.S.T. hereby demands a jury trial on all Counterclaims for which jury trial is allowed by  
26 law.  
27

28           Dated: June 16, 2008



Respectfully submitted,

**SANDLER, TRAVIS & ROSENBERG, P.A.**

**And GLAD & FERGUSON, PA**

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By: /s/Elise Shibles

ELISE SHIBLES

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\* Not admitted in California; pro hac vice application submitted 06/06/08

**PROOF OF SERVICE**

I, Elise Shibles, declare under penalty of perjury that the following facts are true and correct:

I am employed by the law firm of Sandler, Travis & Rosenberg and Glad & Ferguson, P.A., whose address is 505 Sansome Street, Suite 1475, San Francisco, CA 94111. I am over the age of 18 years, and not a party to this action.

On June 16, 2008, I served the following document:

**W.E.S.T. FORWARDING SERVICES COUNTERCLAIM AGAINST  
MASON AND DIXON INTERMODAL, INC.**

by the CM/ECF notification system to the following attorneys of record:

**Matthew S. Conant, Esq.**

Email: [msc@llcllp.com](mailto:msc@llcllp.com)

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this proof of service was executed on June 16, 2008, at San Francisco, CA.

/s/ Elise Shibles  
Elise Shibles